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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRETT MARTELL LEWIS,

Defendant and Appellant.

D068311

(Super. Ct. No. INF058881)

APPEAL from a judgment of the Superior Court of Riverside County, James S. Hawkins, Judge. Affirmed as modified and remanded with directions.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Peter Quon, Jr., Randall Einhorn and Lise Simons Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

In 2010, defendant Jerrett Martell Lewis was sentenced to life without the possibility of parole (LWOP) for felony murder and other crimes he committed less than one month before his 18th birthday. Lewis appealed and this court affirmed the judgment

but remanded for the trial court to amend the abstract of judgment. (*People v. Lewis* (May 10, 2010, D059015) [nonpub. opn.] (*Lewis I.*))<sup>1</sup> In 2014, in response to Lewis's writ petition, the California Supreme Court issued an order to the superior court to show cause why he was not entitled to resentencing pursuant to *Miller v. Alabama* (2012) 567 U.S. \_\_\_\_ [132 S.Ct. 2455, 2460] (*Miller*) and *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*), which as here, involved minors convicted of murder with special circumstances, and set forth certain criteria a court must consider when sentencing such minors. Lewis subsequently filed a petition in the superior court for recall and resentencing. After a hearing, the superior court denied his petition.

On appeal, Lewis contends: (1) the trial court erroneously failed to properly balance and apply the five *Miller* factors; (2) the trial court abused its discretion under section 190.5 by imposing the LWOP sentence; (3) as a matter of law, an LWOP sentence imposed on a juvenile violates the constitutional prohibition against cruel and unusual punishment;<sup>2</sup> and (4) the abstract of judgment must be corrected. We conclude the trial court did not abuse its discretion in ruling on the petition, and Lewis's other

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<sup>1</sup> Specifically, based on the incident set forth below, a jury convicted Lewis of premeditated and deliberate murder (Pen. Code, § 187, subd. (a), statutory references are to the Penal Code, unless otherwise stated); active participation in a criminal street gang (§ 186.22, subd. (a)); and robbery (§ 211). The jury found true special circumstance allegations that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)) and two of the crimes were committed for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)). (*Lewis I, supra*, D059015 at pp. 1-2.)

<sup>2</sup> Lewis concedes that no court has so held, but he raises the issue to preserve it for a future appeal.

arguments regarding his petition lack merit. However, we modify the judgment, affirm the judgment as modified, and remand with directions set forth below.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Commitment Offense*

On June 9, 2007, Wallace Brown, who was a 66-year-old retired Marine, was working the graveyard shift as a security guard at a construction site. His daughter worked for the same company, and at 2:12 a.m., Brown used his personal cell phone to speak with her for approximately 11 minutes. Brown usually carried a wallet with him.

Surveillance video footage showed Lewis, shortly afterwards, accompanied by three males—Akil Williams (aged 18), Jamar Thomas (aged 18), and Darius Lee (a minor)—driving Lewis's mother's vehicle to a gas station. They bought several items and refueled the vehicle. Lewis's three friends were documented gang members and wore clothes consistent with the dress of the Gateway Posse Crips, a local criminal street gang.<sup>3</sup> Before departing, Lewis saw Brown. Minutes later, Lewis parked about three or four blocks away, and he and his friends walked towards Brown's vehicle. Lewis and one of his friends each threw a rock at Brown's vehicle, smashing one front passenger window each. Lewis was six-feet one-inch tall and weighed 280 pounds, according to the

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<sup>3</sup> Lewis's codefendant at trial was Williams, as to whom the court granted a section 1118 motion to acquit. The same judge also presided over Thomas's separate trial, in which Thomas was convicted of the charges of premeditated and deliberate murder, active participation in a criminal street gang, and robbery. The jury found true allegations that Thomas committed the murder during the course of the robbery; committed the crimes for the benefit of a criminal street gang; inflicted great bodily injury; committed the offense while released from custody; and, had suffered a prior strike conviction.

Riverside County Sherriff's booking profile. Lewis forcibly pulled Brown from the vehicle as Brown gripped the steering wheel, and threw him to the ground. Lewis and another of his friends punched Wallace, who was bleeding profusely. Blood got on Lewis's tennis shoes. They left Brown lying on the pavement next to his vehicle. Brown later died from his injuries. The autopsy report stated Brown had a fractured nose; bruises on his forehead, chin, cheek and lip; and broken teeth. Brown had small lacerations on his hands, bruising to his ear, behind his ear, and on his scalp. He had suffered a subdural hematoma that compressed his brain and caused it to shift to the left. He died of closed head injury due to blunt force trauma.

Later that day, during their investigations, a Palm Springs Police Department detective detained then 17-year-old Lewis. Lewis first only admitted he had driven the vehicle, claiming that he had stood by while his companions got out and beat Brown. Lewis later recounted that he looked down at Brown's face and body and saw that he was "fucked up." As we stated in our prior opinion, Lewis later told a detective that after they saw Brown, Lewis knew that the others were going to do something to him just because he looked at them without any fear. Lewis said he got blood on his shirt and remembered grabbing all his clothes and throwing them in the washing machine. (*Lewis I, supra*, D059015 at pp. 7-8.)

As further set forth in our prior opinion, Lewis made additional incriminating statements that night in a jailhouse conversation, telling Williams he had not seen the videotape "where we were beating [Brown] up" and that he was being honest by telling the detectives he had hit Brown. Lewis told Williams that Lewis had dropped Thomas

off, and that he [Lewis] "buried the shoes." According to Lewis, he "thought [Brown] was done" and was "scared 'cause [Brown] was gone . . . him beat up and all." Lewis told Williams he had told detectives that "somebody else came up and kicked [Brown] in the head." Lewis asked Williams to help him "make up the name to just tell them that . . . ." (*Lewis I, supra*, D059015 at p. 8.)

In sentencing Lewis the first time, the trial court stated the only mitigating circumstance was that Lewis had no criminal record. However, the court found numerous aggravating circumstances: the crime involved "great violence, viciousness, cruelty and callousness"; Lewis used a rock as a weapon; the victim was particularly vulnerable; Lewis induced others to participate; and the crime showed planning, sophistication and professionalism in that Lewis planned out the robbery and sneaked up on the victim. The court imposed the LWOP sentence, finding Lewis was a serious danger to society if not imprisoned. (*Lewis I, supra*, D059015 at p. 17.)

In our prior opinion, we directed the trial court on remand to impose a concurrent 2-year sentence on count 2. (*Lewis I, supra*, D059015 at p. 27.)

### *Resentencing Hearing*

The same judge who presided over Lewis's trial presided over his resentencing hearing, and acknowledged reading the parties' briefs and attached exhibits. Lewis submitted psychologist Michael Kania's evaluations dated August 2009 and April 2015; the public defender's investigation reports concerning interviews with Lewis's relatives and others; letters supportive of Lewis, most dated between 2007 and 2010; Lewis's academic records; documents showing Lewis had completed prison courses regarding

anger management, and alcohol and drug addiction; an expert report prepared by a former correctional counselor with the California Department of Corrections and Rehabilitation; case law regarding juvenile sentencing; and transcripts of Lewis's interviews with detectives, as well as Lewis's conversation with his codefendant at the police station. The People's exhibits were the victim's photograph and Lewis's request for resentencing.

### *Expert Testimony*

Dr. Kania's second report and his trial testimony were based on his review of many documents submitted in this case, and structured around the factors set forth in *Miller, supra*, 567 U.S. \_\_\_\_ [132 S.Ct. 2455] and *Gutierrez, supra*, 58 Cal.4th 1354.

#### *(1) The Juvenile's Age*

According to Dr. Kania, neuroscience studies show that a male's frontal lobe, related to executive functioning, is still developing until the individual reaches his mid-twenties. Dr. Kania also stated Lewis had difficulty reading, and had learning problems. Lewis took tests at an unspecified date while in prison, and they showed he was reading at a 5th or 6th grade level.

#### *(2) The Juvenile's Home and Family Environment*

Dr. Kania stated that Lewis's mother had drug problems and Lewis grew up in a chaotic home, where he was repeatedly physically abused and neglected. Lewis witnessed repeated domestic violence at his mother's home and saw family members regularly use drugs. Lewis frequently went to stay with a maternal aunt and her husband in West Virginia and later in Texas; they provided him a more stable home environment. However, Lewis felt obligated to return to California to care for his siblings. Near the

time of Lewis's arrest, he had been working at an amusement park and afterwards at a pool supply company, and used his earnings to provide for his siblings and pay the bills at home. When arrested, Lewis was staying at the home of his grandfather, who would daily kick him out of the house, but Lewis would sneak back in at nights.

### *(3) Circumstances of the Crime*

Dr. Kania stated Lewis reported drinking alcohol the night of the crimes and nothing indicated he had planned to commit robbery or assault. Lewis reported that he was unaware of how much force he had used when beating Brown.

### *(4) Juvenile's Ability to Deal with Law Enforcement and Aid in His Own Defense*

Dr. Kania pointed out that Lewis gave police conflicting reports when he was arrested. Lewis said he testified, exonerating Thomas, because Lewis "felt guilt, remorse and responsibility for his role in the offense." Dr. Kania stated that in light of Lewis's "longstanding history of educational deficits and learning problems . . . [t]his certainly raises questions as to his ability (prior to trial) to adequately assist in his own defense."

### *(5) Possibility of Rehabilitation*

Dr. Kania opined that Lewis's involvement in the crimes was not a sign of irreparable corruption, pointing to Lewis's lack of a criminal record before the crimes, his use of alcohol that night, and his show of remorse upon learning the victim had died. Lewis reported being angry that night because his mother was not looking for a job, he had no stable home, and he had recently learned he would be unable to graduate from

high school, but rather would have to return to school for another year, thus "mak[ing] it impossible for him to continue his football career, as he had hoped."

Dr. Kania stated that Lewis's behavior improved when he was with his maternal aunt in Texas. Further, Lewis's coach indicated he never required a lot of discipline. Dr. Kania reported that Lewis had no behavioral problems either in jail or in prison, and no gang involvement while in prison. Rather, Lewis had completed a course on anger management and another educational course. Lewis reported that prison allowed him to get away from the chaos of his home and see life from a different perspective.

### *The Parties' Arguments and the Court's Analysis*

In their briefs, and at the resentencing hearing, the parties structured their arguments around the five criteria set forth in *Gutierrez*. We summarize their arguments and the court's contemporaneous comments because at the close of hearing, defense counsel asked the court for its reasons for denying Lewis's petition. The court declined to provide further reasons, answering, "Well, I think that was made pretty clear by the discussion of each factor and my interaction on each factor."

#### *(1) The Juvenile's Age*

##### *Lewis's argument*

Lewis argued that as a child he had suffered from learning problems that interfered with his ability to function at his age. He pointed out that two of the three friends who participated in the incident were about a year or two older than him. Consistent with Dr. Kania's argument based on neuroscience, Lewis also argued that given he was 17 years old, he "cannot be argued to have appreciated the risks of his imbecilic actions" in



committing the crimes. As proof of peer pressure he experienced, Lewis adduced the fact that he had testified on Thomas's behalf, accepting full responsibility for the crimes.

### *People's Argument*

The People argued Lewis was approximately three weeks away from his 18th birthday when he committed the crimes. The People further argued: "This was not a true impulsive sudden confrontation with another group or a sudden unplanned shooting at rival gang members. Rather, this was a premeditated plan to ambush an unsuspecting senior citizen at 2 o'clock in the morning. To effectuate their ambush undetected, defendant Lewis personally drove away from the victim's vehicle and parked on a different street so his co-defendants could stealthily walk up undetected on the victim and then brazenly shatter the victim's car windows with large rocks, again something [] Lewis participated in by throwing one of the large rocks." Afterwards, Lewis pulled the victim out of the vehicle. The People also argued Lewis's conduct was not unlike that of many adults; moreover, he was motivated by "pure greed" to rob Brown. Finally, the prosecutor stated that at the original sentencing, several individuals submitted letters on Lewis's behalf, thus showing "that he had somewhat of a support system, from other family members, from friends, from athletic coaches."

### *Court's Analysis*

The court commented that Lewis committed the crimes when he was "pretty close to adult age." The court asked defense counsel why the fact that Lewis assumed responsibility for his siblings' care should not be considered an indicia of maturity. The court added that the record was unclear to what extent Lewis had abused illegal

substances that night: "Sometimes [Lewis] says he was blacked out and he doesn't remember what happened." The court recognized that at Lewis's original sentencing hearing, a detective and a coach had supported Lewis.

## *(2) Juvenile's Home and Family Environment*

### *Lewis's Argument*

Lewis argued he suffered childhood neglect because he was primarily raised by his mother, who abused methamphetamine throughout his childhood. Lewis often slept on the floor. They were evicted numerous times because his mother could not pay rent. His mother barely bought enough food for the children, instead relying on her family members to provide for her children. Lewis claimed his "childhood consisted of a series of relocations, drug use and constant instability." Lewis stated he "suffered from a learning disability due likely to his mother's drug use when she was pregnant with him. He tested well below average, and his parents just magnified his troubles." Lewis stated his parents physically abused him, and his mother several times threatened to kill herself. Lewis tried to shield his siblings from his mother's drug use.

Lewis's father had sporadic contact with Lewis, and was most often under the influence of drugs; he sometimes even drank and used drugs with Lewis. Lewis acknowledged at times staying in a stable home with his relatives in Texas, where he performed well in school and had scholarship opportunities to play college football. However, Lewis constantly worried about his siblings and mother, and returned to California to care for them, but that caused him significant stress.

### *People's Argument*

The People conceded Lewis had "a somewhat disadvantaged upbringing," but claimed it was "one not much different from many individuals who have had similar upbringing and background without making the choices and decisions [Lewis] made." The People pointed out that only Lewis reported he had abused drugs; those who submitted letters on his behalf did not mention that topic. The People also argued that although Lewis had apparently empathized with his siblings and mother, he had showed no compassion for the victim.

### *Court's Analysis*

The court pointed out that Lewis sometimes extricated himself from his family situation by staying with his relatives out of state; however, Lewis many other times "relocated" much closer, to within a one-square mile area, where most of his family lived.

### *(3) Circumstances of the Crime*

#### *Lewis's Argument*

Lewis argued that before this incident he had no criminal history; rather, peer pressure played a role during the incident. Specifically, his codefendant and another companion were older than him by approximately a year or two, and had extensive criminal histories. Lewis also claimed he "voluntarily acknowledged wrongdoing" when confronted by officers in his initial interview. According to Lewis, the fact he was charged and convicted of felony murder means the jury never had occasion to consider if he intended to kill the victim. Lewis told police on the night of the incident he was drunk

and that he had been smoking marijuana, which messed up his mind; moreover, although he was unsure, he believed he possibly was under the influence of PCP as well.

### *People's Argument*

The People conceded Lewis's lack of a criminal history was a mitigating factor. However, invoking aggravating factors set forth in California Rules of Court, Rule 4.421, the People argued that Lewis's crimes involved significant violence, as Lewis had savagely beaten the unsuspecting and vulnerable 66-year-old victim. The People argued Lewis and his companions planned the robbery, selected the victim, and concealed their approach of the victim, who was in the relative safety of his vehicle. The People also argued Lewis induced the others to participate in the crime and lead the assault by throwing a rock to break Brown's car window and pulling him out of his vehicle. The People concluded Lewis posed a great threat to society by violently murdering Brown for such a trivial purpose.

### *Court's Analysis*

The Court stated, "[Lewis and his companions] planned this, they pulled around and they walked through the desert. [Lewis] says it was because the [victim] flashed his lights at him."

### *(4) Juvenile's Ability to Deal with Law Enforcement and Aid in His*

### *Defense*

### *Lewis's Argument*

Lewis argued he was disadvantaged because he had no experience with the justice system, thus affecting his police interview, later negotiations, and trial.

### *People's Argument*

The People argued this factor is inapplicable here because: "Pursuant to Welfare and Institutions Code section 707, [] Lewis could have simply been charged with and convicted of first degree murder. The charging of the special circumstances reflects the heinous nature of the offense and was not a necessary step in holding [] Lewis accountable for his actions. If anything, [] Lewis being less than a month from 18[]years old benefited him in the sense that he was not eligible for capital punishment consideration."

### *Court's Analysis*

The court asked the prosecutor whether Lewis was offered a plea bargain, and the prosecutor answered in the negative.

### *(5) Possibility of Rehabilitation*

#### *Lewis's Argument*

Lewis argued he had showed a capacity to reform when he lived in Texas. Moreover, by the time of the hearing, he was 25 years old, more mature, and better able to control his behavior. He also argued he had succeeded under the structured environment in prison, where he was not formally disciplined. He participated in classes regarding anger management, substance abuse, and is pursuing his GED. A former counselor at the California Department of Corrections and Rehabilitation described Lewis as being "as close to a model inmate as one is likely to find."

### *People's Argument*

The People argued Lewis was not rehabilitated because he had failed to acknowledge his involvement in the robbery or his criminal street gang membership; rather, he continued to blame his upbringing and substance abuse instead of accepting his responsibility for the crimes. The People did not regard Lewis's completion of two courses during his five-year incarceration as sufficient proof of his rehabilitation.

### *Court's Analysis*

Over the prosecutor's objection, the court admitted into evidence prison records showing that Lewis had completed the two courses. However, the court noted Lewis still had not received his GED. The court also appeared to undermine Lewis's argument regarding his good conduct in prison by stating, "There are other incentives to conform in prison other than possibility of parole."

### *The Trial Court's Ruling*

In declining to resentence Lewis, the court paraphrased a statement appearing in *Gutierrez*: "I say that the minor is deemed to be irreparably corrupt, beyond redemption, and thus unfit to reenter society; and notwithstanding the diminished culpability and greater prospects for reform that ordinarily distinguish juveniles from adults." (*Gutierrez, supra*, 58 Cal.4th at p. 1392.) The court stated it would reimpose the LWOP sentence.

## DISCUSSION

### I.

Lewis contends the trial court "failed to properly weigh and apply the [*Miller*] factors, resulting in a decision which does not pass constitutional muster." He specifically claims the trial court erroneously denied the petition based primarily on the circumstances of his crimes and that other more relevant factors weighed in favor of recall and resentencing.

#### A. *Case Law*

##### 1. *Graham v. Florida*

In 2010, the United States Supreme Court held that the Eighth Amendment of the federal Constitution "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (*Graham v. Florida* (2010) 560 U.S. 48, 82.) The Court stated: "Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." (*Id.* at pp. 70-71.) It concluded that "[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, [citation]—provides an adequate justification." (*Id.* at p. 71; see also *id.* at pp. 71-74.)

## 2. *Miller v. Alabama*

In 2012, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Miller, supra*, 567 U.S. at p. \_\_\_\_ [132 S.Ct. at p. 2469].) It noted that in prior cases, "we insisted . . . that a sentencer have the ability to consider the 'mitigating qualities of youth.' " (*Id.* at p. 2467.) The court added: "[G]iven all we have said . . . about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 2469.)

## 3. *People v. Gutierrez*

The California Supreme Court "further held that in considering whether to impose a life sentence without possibility of parole, a sentencing court must consider the five factors enumerated in *Miller*: (1) the inherent impact of the juvenile's age on his culpability; (2) the juvenile's home and family environment; (3) the circumstances of the homicide offense; (4) the juvenile's ability to deal with law enforcement officers and prosecutors as well as effectively assist in his own defense; and (5) the possibility of



rehabilitation." (*People v. Chavez* (2014) 228 Cal.App.4th 18, 32, citing *Gutierrez, supra*, 58 Cal.4th at pp. 1389-1390.) "The question is whether [the defendant] can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Gutierrez, supra*, 58 Cal.4th at p. 1391; accord, *People v. Lewis* (2013) 222 Cal.App.4th 108, 118, 123.)

#### 4. *Montgomery v. Louisiana*

In *Montgomery v. Louisiana* (2016) \_\_\_ U.S. \_\_\_ [136 S.Ct. 718] (*Montgomery*), the United States Supreme Court held that *Miller* must be given retroactive application. The petitioner in that case was 17 years old when he had murdered a deputy sheriff. (*Montgomery*, at p. 725.) He was convicted of murder and ultimately given an automatic LWOP sentence. (*Id.* at p. 726.)

The *Montgomery* court addressed the concern that giving *Miller* retroactive effect would "require States to relitigate sentences . . . in every case where a juvenile offender received mandatory life without parole." (*Montgomery, supra*, \_\_\_ U.S. at p. \_\_\_ [136 S.Ct. at p. 736].) The court explained: "A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. [Citation.] Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (*Id.* at p. 744.)

## B. *Standard of Review*

In California, when a defendant who was 16 or 17 years old at the time of the crime is found guilty of first degree murder with a special circumstance, the only authorized sentences are either (1) 25 years to life, or (2) life without parole. (§ 190.5, subd. (b).) In choosing between them, the trial court must exercise its "discretion under *Miller* to decide on an individualized basis whether a 16- or 17-year-old offender is a 'rare juvenile offender whose crime reflects irreparable corruption.' " ( *Gutierrez, supra*, 58 Cal.4th at p. 1380.) This necessarily means that we evaluate an Eighth Amendment challenge to the trial court's decision to sentence a juvenile to life without parole for homicide under the abuse of discretion standard of review. This standard of review also follows from the inherently discretionary nature of the process of weighing and balancing the relevant factors.

A trial court abuses its sentencing discretion when its decision is arbitrary or capricious, inconsistent with the letter and spirit of the law, or based on "circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) When the sentencing decision involves an assessment of various factors, the trial court has discretion to accord different weight to each factor, and its decision need not be determined by the sheer number of factors on one side or the other. Rather, the trial court's exercise of its sentencing discretion "requires '[a] [quantitative] and *qualitative* analysis' of multiple factors." (*People v. Wright* (1982) 30 Cal.3d 705, 719.)

### C. Analysis

We preliminarily reject Lewis's contention that the trial court's "refusal to explain" the basis for its denial of his petition for resentencing "calls into question whether the trial court actually *considered* the *Miller* factors and weighed them against each other." Lewis concedes no statute or rule required the court to provide a statement of decision for its choice between LWOP and 25 years to life under section 190.5. He further concedes: "To be sure, the trial court *recited* the factors and admitted evidence concerning them, but that is not enough." Finally, he claims that even if the record made clear the court's basis for its ruling, it was an unreasonable ruling.

We agree that the trial court was not required to prepare a statement of decision, although we believe that the better practice is for the court to summarize its findings on the record because doing so demonstrates the court took into account the *Miller* factors in sentencing the juvenile offender, and facilitates appellate review. Nonetheless, as demonstrated above, the court allowed the parties to have a full hearing focused largely on the *Miller* and *Gutierrez* factors. Based on our review of the record, the court's ruling reflected its understanding and evaluation of those criteria. For review purposes, we were able to reconstruct from the transcript of the hearing the court's analysis regarding each of the *Miller* factors.

In support of the judgment, we point out that even the absence of a significant criminal record is not determinative in assessing the constitutionality of a given punishment. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497.) Further, the court pointed out Lewis was almost 18 when he committed the crimes. The court also

concluded that Lewis had the ability to extricate himself from his family background of deprivation by going to live with his aunt and uncle out of state. By all indications, Lewis thrived academically and socially in that environment, and had the support of his athletic coaches. The court was aware Lewis's crimes involved brutal violence, and Lewis took a leading role in carrying them out. The evidence did not show Lewis was subjected to peer pressure. To the contrary, Lewis as the driver of the vehicle was in a better position than the others to determine the course of events that day. He elected to sneak up on Brown, threw a rock shattering the vehicle's window, and forcibly pulled Brown out of the vehicle. Even after Brown was bleeding profusely, Lewis did not seek help for him, but rather left him bleeding. By Lewis's own admission, he buried his own shoes and washed his clothes. He thus attempted to hide his involvement in the crimes. Lewis initially misled police about the full extent of his participation in the crimes. Moreover, Lewis later assumed full responsibility for the crimes when he testified at Thomas's trial.

In sum, the trial court here thoughtfully weighed the applicable factors, including Lewis's youth, his juvenile criminal record, family background and upbringing, and the circumstances of the murder offense, and concluded Lewis was one of those rare individuals whose crime reflects irreparable corruption. We cannot say it exceeded the bounds of reason, all of the circumstances being considered. (See *People v. Gimenez* (1975) 14 Cal.3d 68, 72 [explaining the abuse of discretion standard].) It is not our role to second-guess the trial court. Thus, we are not called upon to say whether, if the decision were up to us in the first instance, we would or would not reach the same

conclusion. Rather, we simply hold that the trial court did not abuse its discretion by sentencing Lewis to life without the possibility of parole.

## II.

We reject Lewis's invitation to hold that the Eighth Amendment categorically prohibits the imposition of LWOP on a defendant who was a juvenile when he committed the crimes.

A sentence in an individual case violates the Eighth Amendment proscription against cruel and unusual punishment only if it is grossly disproportionate to the crime. (*Graham v. Florida, supra*, 560 U.S. at p. 60.) "A court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." (*Ibid.*)

In light of the very serious nature of his crime of murder with special circumstance, Lewis has not demonstrated that his LWOP sentence is disproportionate to his individual culpability. He has not even attempted to argue that it is disproportionate when compared to the sentences of other offenders convicted of the same crime. We conclude that Lewis's sentence in this case, though undoubtedly harsh, does not shock the conscience and is not disproportionate. (Accord, *People v. Blackwell* (2016) 3 Cal.App.5th 166, 202.)

### III.

The parties agree the abstract of judgement fails to reflect that the trial court amended it in accordance with our prior opinion. "As with other clerical errors, discrepancies between a [written order] and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal." (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.) We will amend the judgment by imposing a concurrent 2-year term on count 2.

We also correct the calculation of Lewis's custody credits. Lewis was arrested on June 9, 2007, and was in actual custody until he was first sentenced on September 10, 2007. When the court resentenced him, it should have credited the actual time served against his subsequent sentence. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23, 41.) Accordingly, we amend the abstract of judgment to reflect credits for 1,932 days of actual custody.

## DISPOSITION

We amend the judgment by imposing a concurrent 2-year term on count 2, and awarding Lewis 1,932 days for actual time served. As so modified, the judgment is affirmed. We direct the superior court to amend the abstract of judgment in accord with this opinion, and forward a certified copy of it to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.